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No. 76-5187

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 539 F.2d 612.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1976. The petition was filed on August 9, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who waited until the commencement of trial to challenge a defect in the information against him, was properly tried a second time after the initial information was dismissed upon his motion.

STATEMENT

After a jury-waived trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of theft under the assimilative crimes statute, 18 U.S.C. 13, and I.C. 35-17-5-3, Burns Ind. Stat. 3030. [1/] He was sentenced to five years' imprisonment. The court of appeals affirmed.

The evidence, not in dispute here, showed that Charles Bilskie, who was blind, operated a news stand and candy concession in the lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973, after Mr. Bilskie had placed his two wallets on a counter behind his stand, petitioner was observed by a postal security officer going behind the counter and taking the wallets. The officer shouted at petitioner, who tried to escape but was apprehended.

The district court convened petitioner's jury-waived trial on July 16, 1974. After the prosecutor presented his opening statement outlining the government's evidence (I, Tr. 2-3), the trial judge invited defense counsel to make his opening statement. Instead, defense counsel moved to dismiss the information against petitioner, in part on the ground that the information was fatally defective for failure to state that petitioner had committed the offense knowingly. The trial court pointed out that petitioner could have raised this motion before the commencement of trial (I, Tr. 3):

> Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of time to research them.

The trial court denied petitioner's motion and proceeded with trial, while agreeing to research the issue raised

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1/ I.C. 35-17-5-3, Burns Ind. Stat. 3030 provides:

> Theft in general -- A person commits theft when he (1) knowingly; (a) obtains or exerts unauthorized control over property of the owner ***.

in the motion and consider it at a later time. Petitioner did not object to the continuation of the trial (I, Tr. 5).

After the government's case, the defense rested without presenting any witnesses. The motion to dismiss was then again considered and the trial court determined that the information was indeed defective for failure to state the element of knowing participation. 2/ Accordingly, the trial court dismissed the information (I, Tr. 66-67). Following this dismissal petitioner was indicted. The indictment charged that petitioner acted knowingly. After a bench trial petitioner was convicted.

Petitioner argued on appeal that the Double Jeopardy Clause barred his second trial. The court of appeals concluded that a dismissal, granted at the behest of defendant and required by a defect in the information, is identical for practical purposes to the mistrial declared in Illinois v. Somerville, 410 U.S. 458, and that the Double Jeopardy Clause accordingly does not bar a second trial in these circumstances.

ARGUMENT

1. This case is controlled by Illinois v. Somerville, 410 U.S. 458. In Somerville, upon the prosecutor's motion made after jeopardy had attached, a mistrial was declared and a defective indictment dismissed. A new indictment was procured, the defendant was tried upon that indictment and

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2/ The trial judge was correct. The Assimilative Crimes Act was intended to establish "complete current conformity with the criminal laws of the respective States in which ***[federal] enclaves are situated" (United States v. Sharpnack, 355 U.S. 286, 293). Under Indiana law, it must be shown that a defendant charged under I.C. 35-17-5-3, Burns Ind. Stat. 3030 knowingly committed the offense. Linnemeir v. State, 330 N.E. 2d 373, 376; Martine v. State, 300 N.E. 2d 128, 131; Monroe v. State, 339 N.E. 2d 102, 103; Trader v. State, 331 N.E. 2d 469; Lay v. State, 329 N.E. 2d 650. The information therefore was required to allege that petitioner committed the crime knowingly. United States v. Debrow, 346 U.S. 374, 376.

convicted, and this Court held that the second trial and conviction was not barred by double jeopardy. Although Somerville had expressly asserted his desire to proceed to verdict with the jury then empaneled, this Court concluded that termination of the first trial over his objection was justified by "manifest necessity" and "the ends of public justice" because the defect in the indictment made it impossible, were the trial allowed to proceed, to procure a valid guilty verdict (410 U.S. at 469). The Court held that under such circumstances "the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice" (id. at 471).

Here, as in Somerville, petitioner's first trial was terminated prior to any finding of guilt or innocence because an error in the institution of the proceedings made a valid conviction impossible. 3/ Indeed, petitioner's position is materially weaker than was Somerville's, since, rather than assert his "valued right to have his trial completed by [the] particular tribunal" before which it had commenced (Wade v. Hunter, 336 U.S. 684, 689; United States v. Jorn, 400 U.S. 470, 484), petitioner actually sought to have the proceedings terminated by dismissal of the defective indictment. 4/ In our view, since the principal reason why

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3/ The termination in Somerville was labelled a mistrial rather than a dismissal, but this Court has rejected the notion that the disposition of the double jeopardy question is dependent on the label attached to the termination. See United States v. Sisson, 399 U.S. 267, 290; United States v. Jorn, 400 U.S. 470, 478 n. 7; Serfass v. United States, 420 U.S. 377, 392.

4/ Petitioner's claim (Pet. 4) that the government declined to amend the information when its defect was pointed out is incorrect. Petitioner never raised the possibility of amending the information (cf. Fed. R. Crim. P. 7(e)) but only urged dismissal of the charge. What is more, petitioner could have raised his objection at any time prior to trial. The trial court could then have dismissed the information and the government could have filed an amended information or sought an indictment, as it ultimately did. This stands as an independent argument
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the Double Jeopardy Clause prohibits retrials after some mid-trial, pre-verdict terminations of trials is to protect the defendant's "valued right" to proceed to verdict in the trial then underway, double jeopardy protection should not be afforded (absent prosecutorial or judicial overreaching) to defendants who do not assert their "valued right," but instead themselves request termination of the first trial. Cf. United States v. Gentile, 525 F.2d 252 (C.A. 2), certiorari denied, 425 U.S. 703; United States v. Sedgwick, 345 A. 2d 465 (D.C. Ct. App.), certiorari denied, May 4, 1976 (No. 75-5986).

The cases upon which petitioner relies do not support a contrary result. In Downum v. United States, 372 U.S. 734, the termination of the first trial operated as a "post jeopardy continuance to allow the prosecution to strengthen its case" (Illinois v. Somerville, supra, 410 U.S. at 469); such a factor was no more operative here than in Somerville. In Jorn, unlike the instant case, the trial court's action was an abuse of discretion, and the defendant not only had not requested termination of the trial but was afforded no opportunity to register any objection to the trial court's abrupt discharge of the jury (400 U.S. at 487). Finally, United States v. Jenkins, 420 U.S. 358, involved a determination in the defendant's favor on the merits, made by the factfinder at the conclusion of the trial; the ruling in the instant case was plainly not a determination on the merits; the judge did not act in his capacity as fact-finder in dismissing the information, and thus Jenkins does not aid petitioner.

2. We recognize that this case touches upon an area of double jeopardy jurisprudence -- the permissibility of government appeals and/or retrials following mid-trial

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why the Double Jeopardy Clause does not forbid the second trial. United States v. Kehoe, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.

terminations by the judge as a result of some legal ruling -- that we believe is in great need of further examination by this Court. We have urged the Court to undertake this inquiry in New York v. Brown, petition for writ of certiorari pending, No. 76-358, and we continue to believe that certiorari should be granted in that case and the issue it presents should be resolved at the Court's earliest convenience. 5/

There is, however, some solid ground in this area that need not presently be repatrolled. A second trial is barred when the finder of fact has returned a verdict of acquittal, even though such verdict may be the product of legal error (United States v. Wilson, 420 U.S. 332, 344-351). On the other hand, the Double Jeopardy Clause does not bar a second trial when a defendant has moved for a mistrial (United States v. Dinitz, 424 U.S. 600), has had a conviction set aside on appeal or collateral attack (United States v. Tateo, 377 U.S. 463), or, as in this case and Somerville, when a defect in the institution of the proceedings, not going to the merits of a defendant's guilt or innocence, makes a termination of the proceedings manifestly necessary in the interests of public justice.

In sum, we submit that there is no realistic prospect that cases such as United States v. Martin Linen Supply Co., No. 76-120, certiorari granted November 1, 1976, or New York v. Brown, supra, should the Court agree to hear it, would lead to the overruling or material impairment of the holding of Somerville. If we are correct that Somerville controls this case, no useful purpose could be served by granting review

5/ Since the Court has not acted upon New York's petition, we surmise that it may be holding the case pending disposition of United States v. Martin Linen Supply Co., No. 76-120, certiorari granted November 1, 1976. Because Martin Linen does not involve a mid-trial termination, but rather one occurring at a time when the Double Jeopardy Clause would not have barred a retrial, we think it unlikely that the decision in Martin Linen will be of material assistance in resolving the important issues in Brown, and we continue to believe that the Court should hear Brown this Term.

in the instant case or by holding it to await the disposition of other cases now pending.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.